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IN THE COURT OF APPEALS OF INDIANA

HASHIM HOLLY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0612-CR-1144
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause Nos. 49G02-0606-FB-101490 & 49G02-0602-FD-018758

August 8, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Hashim Holly ("Holly") appeals his five-and-a-half-year sentence for robbery as a Class C felony and battery as a Class D felony. He contends that the trial court abused its discretion by including a dismissed charge as part of his criminal history and that his sentence is inappropriate in light of the nature of his offenses and his character. Because we can say with confidence that the trial court would have imposed the same sentence even if it had not considered the dismissed charge, and because Holly has not persuaded us that his sentence is inappropriate, we affirm the judgment of the trial court.

Facts and Procedural History

On February 1, 2006, Holly touched Jason Godsey ("Godsey") "in a rude, insolent or angry manner" while Godsey was engaged in his duties as an employee of Indianapolis Public Schools, causing Godsey some "pains and abrasions[.]" Tr. p. 21. The State charged Holly with Battery as a Class D felony[1] under cause number 49G02-0602-018758 ("Cause No. 18758"). On June 4, 2006, after being released on his own recognizance on the battery charge, Holly took money from Regina Thomas by threatening the use of force. The State charged Holly with Robbery as a Class B felony[2] and Theft as a Class D felony[3] under cause number 49G02-0606-FB-101490 ("Cause No. 101490"). On August 24, 2006, while incarcerated, Holly allegedly assaulted a correctional officer. The State charged him with Battery as a Class D felony under cause number 49G02-0608-FD-157053 ("Cause No. 157053").

[1] Ind. Code § 35-42-2-1.

[2] Ind. Code § 35-42-5-1.

[3] Ind. Code § 35-43-4-2.

On October 30, 2006, the parties entered into a plea agreement by which Holly agreed to plead guilty to robbery as a Class C felony under Cause No. 101490 (a lesser included offense of the original charge of robbery as a Class B felony) and battery as a Class D felony under Cause No. 18758 and by which the State agreed to dismiss the theft charge under Cause No. 101490 and the battery charge under Cause No. 157053. The State further agreed to recommend a cap of six years on the executed portion of Holly's sentence.

In sentencing Holly, the trial court found as a mitigating circumstance the fact that Holly had accepted responsibility for his actions. However, in discussing this mitigator, the trial court stated:

> I'm not going to give that great weight and primarily for the reason that he was originally charged with a B felony robbery, would have been looking at six to twenty and the State was kind enough and generous enough to give him a C felony robbery in his plea agreement, so . . . And plus I'll also state here today too, when I asked him about these events he was still not taking responsibility for his own actions in the statements he was making to the Court, at least that's my perception.

Tr. p. 48-49. The trial court found Holly's criminal history to be an aggravating circumstance. The court explained:

> I'm going to find his criminal history as aggravating and to this extent, he had a 2000 juvenile battery, it was a misdemeanor B and a 2001 battery which was a misdemeanor A. I will note that both of those involved other students where he was in school with that he assaulted and he had true findings for both of those. As an adult he picked up, first this instant battery, where once again he pled guilty to and assaulted one of the teachers at Arsenal Tech High School and then after he was released on that, is when he picked up his June the 4th robbery charge that we're here on today for sentencing. And although being dismissed, following that, after being locked up on that, then he assaulted a correctional officer. And although that's being dismissed I'm still looking at that because it's -- once again it's

> another incident to violence and based on those that criminal history, as stated that way, this Court believes it has very aggravating circumstance[.]

Id. at 49-50. Pursuant to Indiana Code § 35-50-1-2(d), the trial court was required to impose consecutive sentences on the robbery and battery counts because Holly committed the robbery while he was released upon his own recognizance for the battery. After finding that the aggravating circumstance outweighs the mitigating circumstance, the trial court imposed consecutive advisory sentences of four years for robbery as a Class C felony and one-and-a-half years for battery as a Class D felony, for a total executed sentence of five-and-a-half years. Holly now appeals.

Discussion and Decision

On appeal, Holly contends that his sentence is "inappropriate in light of the nature of the offense and his character." Appellant's Br. p. 3. In 2005, the Indiana General Assembly substantially amended our sentencing statutes in response to *Blakely v. Washington*, 542 U.S. 296 (2004), and *Smylie v. State*, 823 N.E.2d 679, 683 (Ind. 2005), *cert. denied*, 126 S. Ct. 545 (2005). In the most significant change, Indiana Code § 35-38-1-7.1(d) now provides that a court may impose any sentence that is authorized by statute and permissible under the Indiana Constitution "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d) (2005). Our Supreme Court recently weighed in for the first time on the scope of appellate review of sentences under the amended statutes. *See Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *reh'g pending*. Because Holly's brief, the State's brief, and Holly's reply brief were all written before *Anglemyer*, we begin with a brief recap of the principles enunciated therein before turning to the contentions of the parties.

The *Anglemyer* Court first concluded that "under the new statutory regime Indiana trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense." *Id*. at 490. This statement "must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence." *Id*. "If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." *Id*.

On appeal, there are two ways to challenge one's sentence. First, a defendant could argue that the trial court abused its discretion in imposing the sentence. *Id*. "An abuse of discretion occurs if the decision is 'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" *Id*. (citations omitted). A trial court can abuse its sentencing discretion in several ways, including: (1) failing to enter a sentencing statement at all; (2) entering a sentencing statement that explains reasons for imposing a sentence where the record does not support the reasons; (3) entering a sentencing statement that omits reasons that are clearly supported by the record and advanced for consideration; and (4) entering a sentencing statement in which the reasons given are improper as a matter of law. *Id*. at 490-91. If the trial court abuses its discretion in one of these or any other way, remand for resentencing may be the appropriate remedy "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." *Id*. at 491.

The second possible recourse for a defendant appealing his sentence is Indiana Appellate Rule 7(B), which provides: "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The *Anglemyer* Court explained:

> It is on this basis alone that a criminal defendant may now challenge his or her sentence where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence that is supported by the record, and the reasons are not improper as a matter of law, but has imposed a sentence with which the defendant takes issue.

Id. With this framework in mind, we turn to Holly's specific arguments.

Holly's main contention on appeal is that the trial court abused its discretion in including Holly's alleged battery of a correctional officer as part of the criminal history aggravator. He directs us to *Cotto v. State*, where our Supreme Court stated, "A record of arrest, without more, does not establish the historical fact that a defendant committed a criminal offense and may not be properly considered as evidence of criminal history." 829 N.E.2d 520, 526 (Ind. 2005). Holly contends that because he was never convicted of battering a correctional officer and because the State failed to produce any evidence of the alleged battery to the trial court, the trial court should not have included it in Holly's criminal history.

Holly is correct. Indeed, the State concedes that "there appears to be no evidence supporting the court's factual finding that [Holly] assaulted the correctional officer." Appellee's Br. p. 6. However, even if the allegation of battery of a correctional officer is disregarded, the remainder of Holly's record is significant enough to support the criminal

history aggravator. And, as our Supreme Court instructed in *Anglemyer*, if a trial court abuses its discretion in sentencing a defendant, remand for resentencing is unnecessary if we can "say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." 868 N.E.2d at 491. Here, the battery of a correctional officer charge is but a small part of Holly's record, a record that includes two true findings for battery as a juvenile and two prior probation violations. Therefore, even though the trial court abused its discretion by considering Holly's charge for battery of a correctional officer as part of Holly's criminal history, remand for resentencing is unnecessary because we can say with confidence that the trial court would have imposed the same sentence had it only considered reasons that enjoy support in the record.

In one paragraph at the end of his brief, Holly also argues that his sentence is inappropriate in light of the nature of his offenses and his character. As noted in *Anglemyer*, the defendant has the burden of persuading the appellate court that his or her sentence is inappropriate. *Id*. at 494. Holly has not met that burden. First, we note that the trial court imposed the advisory sentence for each of Holly's convictions. While Holly is correct that his offenses were not heinous, "the advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Id*. Second, while the trial court ordered the sentences to run consecutively, it was required by statute to do so. *See* Ind. Code § 35-50-1-2(d). Third, while Holly pled guilty, the significance of this factor is substantially diminished by the facts that the State dropped two additional felony charges and that Holly pled guilty to robbery as a Class C

felony rather than as a Class B felony as originally charged. We are not persuaded that Holly's sentence is inappropriate.

Affirmed.

SULLIVAN, Sr. J., and ROBB, J., concur.